NOTES

UNIFORM CONTRACT LAW OF THE PEOPLE'S REPUBLIC OF CHINA: FIRST COMPARATIVE LOOK

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I. INTRODUCTION

The People's Republic of China (PRC) is one of America's most significant trading partners.[1] Moreover, the PRC is a country with a newly-developing legal system and only the very beginnings of a rule of law.[2] After decades of economic central planning, the PRC in recent years has begun to develop a market economy and the modern legal system required to run it.[3]

Modern Chinese contract law began with the passage of the Economic Contract Law (ECL) in 1982.[4] The ECL represented China's first serious effort to codify a coherent national law of contracts.[5] The ECL only applied

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* As with all my other accomplishments in life, I dedicate this article to my beloved wife, Yali Gregory, and to our sweet little daughter, Estelle.

1. *See Letter from the Chairman United States of America-China Chamber of Commerce* (visited Oct. 1, 1999) <http://www.usccc.org/ chair.htm>.

2. *See* James S. McLean & Zhang Yuqiang, *China's Foreign Economic Contract Law: Its Significance and Analysis*, 8 NW. J. INT'L L. & BUS. 123 (1987).

3. *See* Lucie Cheng & Arthur Rosett, *Contract with a Chinese Face: Socially Embedded Factors in the Transformation from Hierarchy to Market, 1978-1989*, 5 J. CHINESE L. 143, 196-99 (1991).

4. *See* Economic Contract Law of the People's Republic of China [hereinafter ECL]. Chinese and English versions are available on-line. *See University of Maryland Chinalaw Web Page* (visited Aug. 18, 1999) <http://www.qis.net/chinalaw/prclaw19.htm>.

5. *See* Daniel Rubenstein, *Legal and Institutional Uncertainties in the Domestic Contract*

to domestic contractual relations between Chinese parties. The fundamental purpose of the law was to facilitate contracting in the PRC's planned economy.[6] The ECL was followed on March 21, 1985 by the Foreign Economic Contract Law (FECL).[7] As the name indicates, the FECL was designed to apply to foreigners who did business with Chinese entities. The ECL, the FECL, the General Principles of the Civil Law (GPCL),[8] a third contract law dealing with technologies,[9] and numerous provincial contract codes, made up the *corpus juris* of the law of contract in China.[10]

On October 1, 1999 the Uniform Contract Law of the People's Republic of China (UCL) took effect.[11] This historic law was enacted by the National People's Congress (NPC) (the Chinese legislature) on March 15, 1999. For the first time, one single law of contracts applies to both Chinese-Chinese as well as Chinese-foreigner contractual relations.[12] The UCL replaces the three other national, interim contract laws, the ECL, the FECL, and the Technology Contract Law, thus the name "Uniform" Contract Law.[13] This note represents one of the first articles to explore the possible implications of the UCL on contracts both inside and outside of China.

The UCL is focused on a "market-oriented" economy unlike the three previous laws which were built around a "planned economy."[14] "One

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Law of the People's Republic of China, 42 MCGILL L.J. 495, 500-02 (1997) (discussing PRC "contract law" prior to 1978).

6. *See* Ping Jiang, *Drafting the Uniform Contract Law in China*, 10 COLUM. J. ASIAN L. 245, 246 (1996).

7. *See* Foreign Economic Contract Law of the People's Republic of China [hereinafter FECL]. Chinese and English versions are available on-line. *See University of Maryland Chinalaw Web Page* (visited Aug. 18, 1999) <http://www.qis.net/ chinalaw>.

8. *See* HENRY R. ZHENG, CHINA'S CIVIL AND COMMERCIAL LAW 49-50 (1988) (introducing the PRC Civil Code).

9. *See* Jiang, *supra* note 6, at 246 (stating that the GPCL promulgates the basic principles in contract law, while the ECL, the FECL, and the Technology Contract Law set forth the substantive standards).

10. *See id.*

11. *See* The Uniform Contract Law of the People's Republic of China [hereinafter UCL]. The Chinese and English versions are available on-line. *See Chinese Commercial Law Forum* (visited Aug. 18, 1999) <http://www.cclaw.net>.

12. *See* ZHENG, *supra* note 8, at 49 (explaining that despite some attempts, China has never (until now) been able to issue a uniformly-codified contract law).

13. Under the old system comprised of three different main contract laws and countless local contract laws, the foreigner, acting under the FECL, when dealing with Chinese parties, whose third party obligations were governed by the ECL and other local laws, often found himself enmeshed in a confusing set of contradictory law. *See* Roy F. Grow, *Resolving Commercial Disputes in China: Foreign Firms and the Role of Contract Law*, 14 NW. J. INT'L L. & BUS. 161, 180 (1993). The UCL has the prospect of relieving this confusion because for the first time, all parties to a contract will be under the same contract law, both domestic and international. *See id.*

14. *See* Wang Xuanjun, *Features of the New Contract Law of the People's Republic of China* (visited Sept. 10, 1999) <http://www.eaglelink.com/law-review/w99/wang2.htm>.

striking aspect of the new contract law is that it tries to solve existing problems by introducing a fistful of legal concepts borrowed from Western jurisdictions."[15] Furthermore, the new UCL is written by some of the best legal scholars in China rather than by Communist bureaucrats as was the case with previous contract laws.[16]

Because the UCL has only very recently taken effect, there exists a great dearth of scholarly review concerning its application.[17] Therefore, this article relies heavily on previous material dealing with the application of the ECL and the FECL. The ECL and the FECL were enacted specifically to support the centrally planned economy.[18] In making comparisons with those laws, this Note will comment on the changes made to the UCL in order to bolster the newly emerging market economy. In addition, this Note will consider the UCL's interaction with the GPCL.[19] The United Nations Convention on Contracts for the International Sale of Goods[20] (CISG)[21] and the American Uniform Commercial Code (UCC) will also serve to contrast and compare the UCL. Many of the new concepts embodied in the UCL are loosely defined and vague in the absence of official explanation or implementing measures.[22] This Note compares and contrasts the terms employed in the previous laws with the new and retained language in the UCL. Furthermore this Note reviews scholarly literature dealing with the application of those previous laws. In this way, conclusions can be drawn as to how the new UCL will be interpreted and applied.[23] This Note will

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15. *China's New Contract Law: Unity a Chaos*, BUSINESS CHINA, Apr. 12, 1999.

16. *See* Wang Xuanjun, *supra* note 14; Jiang, *supra* note 6, at 245 (explaining the process of drafting the UCL).

17. The author was not able to find even one article dealing with the final version of the UCL as it passed in March. The author was able to find two law review articles dealing with early drafts of the UCL. *See* Jiang, *supra* note 6; Wang Liming, *An Inquiry into Several Difficult Problems in Enacting China's Uniform Contract Law*, 8 PAC. RIM L. & POL'Y J. 351 (1999).

18. Since the 1949 Communist Revolution, the PRC has been primarily, and at times, exclusively, a Non-Market Economy (NME) which has used a series of "Five Year Plans" as guiding basis for centrally controlled planned economic development. The principle motivation behind passing the ECL was to further the state's Five Year Plan by facilitating contracting between state agencies. The basis of the FECL was more "freedom of contract" (of course with the idea in mind that "freedom of contract" would attract foreign investment and in that way indirectly further the state's Five Year Plan). *See generally* ZHENG, *supra* note 8 (explaining this gradual development in Chinese law to suit the new market-oriented economy); Daniel Rubenstein, *supra* note 5, at 509 (giving a very broad outline of the development of Chinese contract law).

19. *See* Wang Liming, *supra* note 17, at 349-56.

20. United Nations Convention on Contracts for the International Sale of Goods, U.N. Doc. A/Conf.97/18 Annex I (1980) [hereinafter CISG].

21. The PRC ratified the CISG on December 11, 1986. *See id.*

22. C.F. Pan, *New Law Seen to Paint Over Old in Lighter Shade of Gray*, S. CHINA MORNING POST, July 8, 1999, at 2.

23. Here, the author where possible has relied on the Chinese versions of the different laws

also comment on how the UCL reflects the drafters' intentions to make a contract law more firmly based on freedom of contract principles, and thus more suited to China's aspiring market economy.[24]

Although China is a signatory to the CISG, the international lawyer should take care not be lulled into a false sense that he no longer need be familiar with homegrown Chinese contract law. The UCL may still be the applicable law even in an international transaction with another CISG signatory nation,[25] and even more possibly in an international transaction with a non-CISG signatory nation.[26] Furthermore, with the growing number of American companies participating in Chinese-Foreign joint ventures, which are considered Chinese legal persons,[27] it might even be the case that the CISG is not applicable at all.[28] In certain types of business relationships, such as Sino-Foreign Equity Joint Ventures, Sino-Foreign Cooperatives, and various Natural Resource contracts, the application of Chinese law is mandatory.[29] Also as in any country, there are certain elements of mandatory Chinese law which will apply whether or not the parties contract

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and conventions. In the realm of English translations of Chinese legal material, there exist many diverging and potentially inaccurate translations. Therefore, when comparing phrases from the ECL to the FECL and then to the new UCL, it is most accurate to use the Chinese text version in the process. Otherwise, the situation arises where the English translation of the FECL translated a phrase one way while the English translation of the UCL translated the same Chinese text in a different way. An analysis of the two English versions would yield the conclusion that the law had changed. In reality, only the translations diverged.

24. *See* Jiang, *supra* note 6, at 257.

25. *See* CISG, *supra* note 20, art. 6. Under the CISG, parties may exclude the application of the Convention where it would otherwise apply. *See id.*

26. *See* Jianming Shen, *Declaring the Contract Avoided: The U.N. Sales Convention in the Chinese Context*, 10 N.Y. INT'L L. REV. 7, 9 (1997) (explaining that "China declared that it would not be bound by Article 1(1)(b), which provides that the Convention applies where rules of private international law lead to the application of the law of a Contracting State . . . . Due to this non-applicability of Article 1(1)(b) to China, Chinese domestic laws, instead of Convention provisions, will govern international sales contracts between a Chinese party and a party of a non-Contracting State when the rules of private international law lead to the application of Chinese law."); *see also* CISG, *supra* note 20, arts. 1(b), 95; RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM ORIENTED COURSEBOOK 90-91 (explaining that the United States made a similar declaration as to article 1(1)(b), and that Germany made its own declaration that Germany does not consider states which have made such declarations [presumably China and the United States] to be "Contracting States" within the meaning of Art. 1(1)(b)). The result of Germany's declaration should be that if a Chinese party and a party from a non-signatory country were before a German court, the German court would not apply the CISG even though Germany is a signatory. Choice of Law factors could point to the UCL in such a case.

27. *See* ZHENG, *supra* note 8, at 62.

28. Since the Chinese-Foreign Joint venture is considered a Chinese legal citizen, in a situation where a non-Chinese party, working within such a joint venture, contracts with a wholly Chinese party, the resulting relationship is not an international contract and therefore the CISG is inapplicable.

29. *See* UCL, *supra* note 11, art. 126.

to use a different country's law.[30]

The UCL is a massive document, consisting of over four hundred twenty-seven articles. No single note could possibly explore the entire law. The UCL is split into General Principles and Specific Provisions. The former outlines the substance of contracts in general whereas the latter addresses specific kinds of contracts dealing in specialized subject matter.[31] This Note will focus on the "core" areas of any contract law: Parties to the Contract, Formation of Contract, Invalidity of Contract, Performance of Contract, Breach and Damages, Assignment and Delegation, Dispute Settlement, and Excuse of Performance.[32]

In order to illustrate possible different outcomes under the UCL, this note will refer to a hypothetical: a contract was concluded between Rohm and Hass International Trading Co. ("Rohm & Haas") and China National Chemical Import and Export Corporation ("ChemImpex"), a Chinese importer. The contract called for the sale of pesticides urgently needed in China to avoid destruction of important crops by a seasonal pest. Scheduled deliveries were to take place over a period of five years with periodic payments. The pesticides were to be shipped by the Chinese state-owned shipping company ("Shipper"). ChemImpex notified Rohm & Haas that the particular type of pesticide was to be used to eliminate a particular type of insect. ChemImpex made Rohm & Haas aware that the pesticide would be used immediately following delivery. The first pesticides were delivered to Shipper and arrived in China without incident. Upon their arrival and inspection, however, the pesticides did not conform to the specifications of the contract. The effect of the lack of conformity was such that the delivered pesticides would not be suitable for eliminating the particular type of insect. As a result, many farmers who had contracted with ChemImpex to buy the pesticides lost their crops. Naturally, these farmers sued ChemImpex for failure to deliver the pesticides.[33]

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30. *See* McLean & Zhang, *supra* note 2, at 132-33.

31. *See generally* UCL, *supra* note 11. The General Principles consists of such contract fundamentals as Formation of Contracts, Validity of Contracts, Performance of Contracts, Amendment and Assignment of Contracts, Discharge of Contractual Rights and Obligations, and Breach. The Specific Provisions consists of specialized rules for Sales Contracts, Contracts for Supply of Power, Water, Gas, or Heat, Gift Contracts, Contracts for Loan of Money, Financial Leasing Contracts, Technology Contracts, etc. *See id.*

32. The author borrowed this sequence from Zheng's discussion of the FECL. *See* ZHENG, *supra* note 8, at 62-69.

33. The author borrowed and liberally modified this scenario to suit present purposes from an article discussing the FECL. *See* Shen, *supra* note 26, at 15.

II. PARTIES TO CONTRACT

The UCL seems to settle long-lingering questions over who has the capacity to contract in the PRC.[34] Under the FECL, a Chinese individual could not be a party to a contract.[35] The FECL applied, on the foreign side, to foreign individuals, enterprises, or other economic organizations, but on the Chinese side, only to PRC "enterprises" or "other economic organizations."[36] This restriction on capacity to contract was a significant impediment to freedom of contract.

Under the FECL, a foreign party had to ensure that the Chinese party was actually an "enterprise" within the Chinese meaning, otherwise the contract would be invalid.[37] If it turned out later on that the Chinese entity was not properly approved and registered, the contract might not be protected under the FECL.[38]

The new UCL no longer distinguishes capacity to contract based on whether a party is domestic or foreign. The UCL gives contractual capacity to "natural persons,[39] legal persons, or other organizations with equal standing."[40] Therefore, in terms of the hypothetical, ChemImpex could contract with Rohm & Haas under both the FECL and the UCL (assuming ChemImpex met the definition of a Chinese "enterprise"). However, under the FECL, a Chinese individual would have been precluded from dealing

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34. *See* Cheng & Rosett, *supra* note 3, at 207-16. Cheng and Rosett explain how the various factors in Chinese history and government in the past had led the PRC government to deny individuals the capacity to contract. *See id.* Since individuals could not contract, in the era of economic reform of the 1980s, individuals would borrow names of economic organizations in order to be able to contract. *See id.* This led to much confusion when entities such as Universities (which had capacity to contract) set up businesses as surrogates for Chinese individuals who did not have the capacity to contract. *See id.* Because the UCL now allows individuals to contract, this phenomena should diminish.

35. This is not to say that the Chinese individual could not contract. *See id.* The individual's contractual obligations, however, would be governed by principles outlined in the GPCL rather than in the ECL or the FECL. "Thus a Chinese individual who purchase[d] a car from a Japanese company [would] not be covered by the [FECL]; instead, the general rules on contract outlined in the Civil Code [would] apply." ZHENG, *supra* note 8, at 63. *But see* Rubenstein, *supra* note 5, at 512 (discussing the lack of Chinese individuals' capacity to contract even under the GPCL).

36. *See* FECL, *supra* note 7, art. 2.

37. *See* McLean & Zhang, *supra* note 2, at 131-32.

38. *See* Rubenstein, *supra* note 5, at 513.

39. UCL, *supra* note 11, art. 2. The Chinese version uses a literal translation of the English term "natural person" which is "ziran ren." *See id.* Neither the ECL nor the FECL used this term, even when applying to foreigners in their capacity as individuals, as "natural persons." This shift to the literal translation of the English "natural person" seems to be a reaffirmation that the UCL is intended to be in greater conformance with international practices than previous Chinese contract laws.

40. *Id.*

with Rohm & Haas whereas the UCL may now apply to such transactions.

The FECL's "economic organization" was replaced in the UCL by "organization" from which it seems that the UCL applies to agreements of an even non-economic nature, thus widening the UCL's scope of application.[41] This expansion of parties with the capacity to contract further bolsters the claim that the UCL is based on principles of freedom of contract.[42]

In considering parties to a contract, the position of third-party beneficiaries is also important. Under American law, depending on the parties' intentions vis-á-vis a third party, a third-party, not actually privy to the contract may have enforceable rights under the contract.[43] Previous Chinese contract law did not provide for third parties to have enforceable rights in contracts to which they were not privy.[44]

For purposes of the hypothetical, Rohm & Haas would like to know if it might be directly liable to any of the growers, customers of ChemImpex, who may have been harmed by the nonconforming nature of the pesticides. Under previous Chinese contract law, the answer was no.[45] It appears that even under the new UCL, third party beneficiaries do not have rights under the contract.[46] This interpretation of the UCL as lacking third party beneficiary rights is buttressed by the statements of at least one of the law's drafters.[47]

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41. *See* UCL, *supra* note 11, art. 1. Recall that China's principal motivation for developing the earlier contract laws was to better run the centrally-planned economy. By removal of the term "economic" from parties competent to contract, the NPC may have been trying to bolster the UCL's image as a true contract law in the international sense "formulated in order to protect the lawful rights and interests of contract parties." *Id.* However, the UCL also states that in addition to protecting legal rights, its purpose is to "safeguard social and economic order, and to promote socialist modernization." *Id.*

42. *See generally* Wang Xuanjun, *supra* note 14 (explaining how freedom to contract was a continuing theme in the drafting of the UCL).

43. *See* RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981); E. ALLEN FARNSWORTH & WILLIAM F. YOUNG, CONTRACTS: CASES AND MATERIALS 863-64 (5th ed. 1995) (introducing third party beneficiary concepts).

44. *See* Wang Liming, *supra* note 17, at 361. Wang explains that under the Chinese civil law concept of "contract relativity," contracts are viewed as only effective between the parties which have effected them. *See id.* at 358-59.

45. *See id.* at 357.

46. *See* UCL, *supra* note 11, arts. 64-65. Article 64 states: "Where the parties prescribed that the obligor render performance to a third person, if the obligor fails to render its performance to the third person, or rendered non-conforming performance, it shall be liable to the obligee for breach of contract." *Id.* Article 65 states: "Where the parties prescribed that a third person render performance to the obligee, if the third person fails to perform or rendered non-conforming performance, the obligor shall be liable to the obligee for breach of contract." *Id.*

47. *See* Wang Liming, *supra* note 17, at 361 (explaining that the author Wang is a member of the Chinese legislature (NPC) which drafted the UCL).

III. FORMATION OF CONTRACT

Article Seven of the FECL provided that "[a] contract is formed when the clauses of contract are agreed in written form and signed by the parties."[48] The ECL allowed some oral contracts and the UCL liberalizes the writing requirement even more.[49] The UCL specifically states that "[a] contract may be made in a writing, in an oral conversation, as well as in any other form."[50] Removing the writing requirement also brings the UCL more in line with the CISG and UCC.[51] Doing away with formalisms such as writing also contributes to the overall freedom to contract.[52]

Under Article Seven of the FECL, when one party requests to sign a confirmation letter, then the contract is formed only upon the signing of the confirmation letter.[53] Perhaps this was a uniquely Chinese way of trying to win the "Battle of the Forms."[54] However, the new UCL abandons this approach, and simply states that "[a] contract is concluded by the exchange of an offer and an acceptance."[55] This is apparently a completely new concept to Chinese law.[56] This offer-acceptance method of contract formation is probably also the single most significant advancement in terms

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48. FECL, *supra* note 7, art. 7.

49. *See* ECL, *supra* note 4, art. 3.

50. UCL, *supra* note 11, art. 10 (explaining that any form may be used, but that certain types of contracts shall be in writing if a relevant law or administrative regulation so requires).

51. *See* U.C.C. § 2-201 (1978) (discussing the need for a writing requirement only to satisfy the Statute of Frauds); CISG, *supra* note 20, art. 11. In addition, such a writing requirement was commonplace in the practices of the Soviet Union and other Eastern European nations from which China derived early Communist inspirations. *See* McLean & Zhang, *supra* note 2, at 135.

52. *See* Jiang, *supra* note 6, at 249.

53. *See* FECL, *supra* note 7, art. 7 (stating that "in case one party requests to sign a confirmation letter when the agreement is reached by the means of letter, telegram or telex, the contract is only formed upon the confirmation letter being signed"). Perhaps the only effect of this FECL provision is to make explicit what could otherwise be reasonably implied from the offer-acceptance formation mechanism in both the CISG and UCC. If one party unambiguously indicates his intent not to be bound until a confirmation letter is signed, then that signature might be looked at as either a condition precedent to the contract's becoming effective or as proof that a purported acceptance was not an acceptance at all. *See* CISG, *supra* note 20, art. 18 (dealing with intent); *see also* U.C.C. § 2-206 (expressing that an unambiguous indication to the contrary will defeat what would otherwise be determined an acceptance).

54. "The Battle of the Forms" is the result of each side using its standard form contracts which contain terms different than those of the other contracting party (boilerplate language). See FARNSWORTH, *supra* note 43, at 161. During the course of contract negotiations, the parties may not pay much attention to these differences. *See id.* But when a breach occurs and the parties go back and look at all the documentation which makes up the "contract," it may be difficult to tell which terms actually apply.

55. *See* UCL, *supra* note 11, art. 13. In addition, Article 25 states: "a contract is formed once the acceptance becomes effective." *Id.* art. 25.

56. *See* Pan, *supra* note 22, at 2.

of freedom of contract brought by the UCL.[57]

The provision dealing with the classical acceptance varying offer (the root of the last-shot problem) in the new UCL is worded almost identically to that of the CISG, and therefore one could expect the same sort of problems to arise under both.[58]

IV. INVALID CONTRACTS

Under the FECL, contracts which violate the public policy, interest, or law of the PRC or are concluded by means of fraud or duress are invalid.[59] One Chinese scholar believes that these concepts readily find their parallels in the common law concepts of unconscionability.[60] These concepts are carried over in the new UCL as well.[61] The notion of invalidating contracts based on public policy is not foreign to American law.[62] However, given the PRC government's broad interpretation of "public policy," contracts have the potential to be invalidated on grounds much more varied than those imagined in our American tradition.[63]

Article 52 of the UCL states, "A contract is invalid in any of the following circumstances . . . (iv) The contract harms public interests; (v) The contract violates a mandatory provision of any law or administrative regulation."[64] In the PRC, the State Council and the State Planning Commission set general guidelines and priorities for a five-year period.[65]

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57. *See* Jiang, *supra* note 6, at 249.

58. *See* UCL, *supra* note 11, arts. 30-31; CISG, *supra* note 20, art. 19; *see also* FOLSOM ET AL., *supra* note 26, at 80-98 (explaining the functioning of the "last shot doctrine" under the CISG and under the UCC). Under neither the CISG nor the UCC is there any language a lawyer can include which would ensure that his terms would "win" under the "Battle of the Forms." *See id.* at 84. It is the author's belief that the UCL presents the same situation.

59. *See* FECL, *supra* note 7, arts. 9, 10.

60. *See* ZHENG, *supra* note 8, at 65.

61. *See* UCL, *supra* note 11, art. 52. In fact, the first three enumerated items of Article 52 read like a codification of the Common Law of unconscionability, however, notice the emphasis on harming the state:

> [A] contract is invalid in any of the following circumstances: (i) One party induced conclusion of the contract through fraud or duress, thereby harming the interests of the state; (ii) The parties colluded in bad faith, thereby harming the interests of the state, the collective or any third party; (iii) The parties intended to conceal an illegal purpose under the guise of a legitimate transaction.

Id.

62. *See* FARNSWORTH & YOUNG, *supra* note 43, at 346-47 (discussing various public policy arguments that affect contractual relations).

63. *See* Rubenstein, *supra* note 5, at 516-17.

64. UCL, *supra* note 11, art. 52.

65. *See* Grow, *supra* note 13, at 169.

The resulting "Five Year Plan" is used by the authorities in Beijing to set out national priorities and to "influence the nature and pace of economic development" by determining, in part, how scarce resources should be allocated.[66]

Because Article 52 focuses on "harming the interests of the state" and harming "public interest," a strong case could be made that if the subject matter of the contract were not in conformance with the priorities laid forth in the Five Year Plan, it would be more likely that the contract would be invalidated.[67] However, current thinking is that the Five Year Plan is becoming less and less influential as the PRC continues to move towards a market economy.[68] At least one author feels that conflicts with the Five Year Plan still provide opportunity for invalidation of contracts.[69] At any rate, Rohm & Haas should verify the priority of agricultural production (which would seem to include pesticides) in the current Five Year Plan.

Moreover, the same scholar goes on to explain that the FECL contained nothing similar to the common law concept of voidability of contract.[70] This lack of voidability of contract was a remnant of the planned economy mentality of the FECL drafters.[71] The UCL changes this by adding explicit provisions for voidability based on limited capacity (age) and unauthorized agent.[72] In either case, the UCL states that upon demand, the principal must ratify the contract within one month, thereby precluding him from later declaring the contract voided based on age or unauthorized agent.[73]

Since under the new UCL, the contract may be voided if the signing agent had inadequate authority, Rohm & Haas will want to ensure that the Chinese agent with whom it deals has appropriate authority to enter into a contract. Many Chinese entities, especially formerly state-owned entities entail complicated bureaucracies. These bureaucratic webs make it difficult to discern whether the person purporting to be the authorized agent has adequate authorization to contract on behalf of the company.[74]

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66. *Id.*

67. UCL, *supra* note 11, art. 52.

68. *See* Wang Liming, *supra* note 17, at 356-58 (explaining how references to the Five Year Plan were removed from the ECL in 1993 amendments).

69. *See* Rubenstein, *supra* note 5, at 516-17 (discussing how the removal of overt references in the domestic contract law arguably did not diminish the ability of Chinese courts to invalidate contracts in conflict with the state plan).

70. *See* ZHENG, *supra* note 8, at 65 (explaining that while the FECL contains nothing like the common law concept of voidability, this concept is incorporated by virtue of the Chinese Civil Code).

71. *See* Jiang, *supra* note 6, at 249.

72. See UCL, *supra* note 11, arts. 47-48.

73. *See id.*

74. *See* Pan, *supra* note 22, at 2.

If Rohm & Haas were to have doubts after the conclusion of the contract as to the Chinese party's agent's capacity to contract, it should avail itself of the UCL's provision which allows it to demand that the other party's principal ratify the contract within one month.[75] If upon demand, ChemImpex were not to ratify within one month, the contract would be deemed canceled.[76] In fact, at any time prior to ratification, Rohm & Haas would be entitled "in good faith" to cancel the contract.[77] This could potentially lead to problems were Rohm & Haas to receive credible, but erroneous, information that the Chinese party did not have appropriate authority to contract.

Rohm & Haas could "in good faith" cancel the contract based on this information, which later turned out to be erroneous, and therefore miss its delivery deadline. The UCL seems to indicate that Rohm & Haas would have been within their rights to cancel under such circumstances.[78] The decision whether to cancel once suspicion arises or to demand ratification could be driven by such things as the nearness of the delivery date and the availability of other buyers, subject to the "good faith" provision.[79]

The UCL also adds the concept of "apparent authority" to Chinese contract law.[80] Notwithstanding the above discussion, even if the agent did not have proper authorization to contract on behalf of the principal, his act is still valid so long as it was reasonable for the other party to believe that he had such authority.[81] This should give Rohm & Haas some cause for relief so long as it was reasonable for them to believe that the Chinese representative had authority to act on behalf of ChemImpex. The term "reasonable" is still open to much interpretation. Therefore, Rohm & Haas should still avail itself of the mandatory ratification procedures outlined above if it should have doubts as to the scope of the other side's authority to contract on behalf of ChemImpex.

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75. *See* UCL, *supra* note 11, art. 48.

76. *See id.*

77. *See id.*

78. *See id.* Perhaps, an erroneous cancellation sanctioned by the UCL is not as serious a problem because Article 48 does require that "[c]ancellation shall be effected by notification." *Id.* Since under the UCL, cancellation is not effective until notification, one would assume that when Rohm & Haas contacts ChemImpex to inform it that Rohm & Haas is canceling the contract, ChemImpex' principal would quickly ratify. *See id.*

79. *See id.* The "good faith" requirement would no doubt preclude Rohm & Haas' canceling the contract on the pretext of suspected unauthorized agent for the purpose of getting a better deal somewhere else in the market.

80. *See* Pan, *supra* note 22, at 2.

81. *See* UCL, *supra* note 11, art. 49.

V. PERFORMANCE OF CONTRACT

In the United States, contract law emphasizes that either performance or damages are satisfactory, so long as the damages put one into the same position in which one would have been had the contract been fully performed.[82] In the PRC during the era of strict central planning, because contracts were viewed more as administrative orders, a party could be ordered to "perform specifically what he had 'agreed' to do, no matter how impractical or costly."[83]

Against the backdrop of super specific performance, the FECL emphasized that contracts were legally binding and *should* (English version) be performed.[84] Interestingly enough, the English version of the UCL stated: "The parties *shall* fully perform their respective obligations. . . ."[85] The English translation of the FECL employed "should"[86] and that of the UCL employs "shall."[87] But, the Chinese versions of both laws employ the same term, which is probably best translated as the English "should."[88] Moreover, this is not the first time in Chinese contract law that this should/shall ambiguity has arisen.[89] Therefore, this change in terminology in the English version is not strong evidence that the new law signals a shift to an even stricter view of specific performance. Rather, it is simply inconsistent translation.

Some authors believe that the drafters of the FECL intended performance to be mandatory, and since the same language is carried over in the UCL, presumably, performance would still be mandatory.[90] At the very least, the express language of the UCL indicates that a party has a right to specific performance except in limited circumstance.[91]

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82. *See* FARNSWORTH & YOUNG, *supra* note 43, at 483.

83. Rubenstein, *supra* note 5, at 518.

84. *See* FECL, *supra* note 7, art. 16.

85. *See* UCL, *supra* note 11, art. 60.

86. *See* FECL, *supra* note 7, art. 16.

87. *See* UCL, *supra* note 11, art. 60.

88. The term "yingdang" in common usage is most closely translated as "should." *See* YUANDONG GUOYU CIDIAN 355 (Yuandong Tushu Co. 1992) [hereinafter CIDIAN]. However, the UCL does employ the term "yingdang" in certain areas where it could only possibly mean "shall." *See* UCL, *supra* note 11, art. 86.

89. *See* Rubenstein, *supra* note 5, at 519.

90. *See* McLean & Zhang, *supra* note 2, at 136.

91. *See* UCL, *supra* note 11, art. 110. Article 110 states:

> Where a party fails to perform, or rendered non-conforming performance of, a non-monetary obligation, the other party may require performance, except where:
> (i) performance is impossible in law or in fact;
> (ii) the subject matter of the obligation does not lend itself to enforcement by

This requirement or at least preference for specific performance could be problematic for Rohm & Haas if ChemImpex were to demand that conforming pesticide be shipped immediately. Although the UCL does not allow for specific performance if it is "impossible" or if its cost would be "excessive,"[92] these terms are open to wide interpretation. The problem gets even more complicated for Rohm & Haas if it turns out that it cannot manufacture the type of pesticide required.

The FECL like the UCC provided for a right to adequate assurance of performance if faced with the prospect that the other party would not perform.[93] The FECL required the suspending party to have "conclusive evidence" that the other party could not perform his obligations before the right to demand assurances was triggered.[94] It also provided that upon the prospective breacher's providing of "a full guarantee of performance," the party shall perform the contract.[95] However, the FECL failed to offer clarification as to what constituted "conclusive evidence" or "guarantee of performance."[96]

In terms of when a party may suspend performance, the UCL retains essentially the same language as the FECL, except that it improves upon the FECL by adding a laundry list of factors to look at in determining the other party's inability to perform.[97] In addition, the FECL required a "full guarantee of performance"[98] whereas the UCL perhaps requires less of a guarantee, only requiring an "appropriate" assurance.[99] Although the three

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specific performance or the cost of performance is excessive;
(iii) the obligee does not require performance within a reasonable time.

Id.

92. *See id.*

93. *See* Rubenstein, *supra* note 5, at 520.

94. *See* FECL, *supra* note 7, art. 17; *see also* U.C.C. § 2-609 (1978) (requiring a "reasonable grounds for insecurity [to] arise").

95. FECL, *supra* note 7, art. 17.

96. *See* ZHENG, *supra* note 8, at 65. Although the UCC does not define its terms in this respect either, at least the comments to the UCC define and give examples of these terms. The author was unable to find a similar Chinese interpretive guide for the FECL.

97. *See* UCL, *supra* note 11, art. 68. Article 68 lists the following factors:

(i) [i]ts business has seriously deteriorated;
(ii) [i]t has engaged in transfer of assets or withdrawal of funds for the purpose of evading debts;
(iii) [i]t has lost its business creditworthiness;
(iv) [i]t is in any other circumstance which will or may cause it to lose its ability to perform.

Id.

98. *See* FECL, *supra* note 7, art. 17 ("Chongfen baozheng").

99. *See* UCL, *supra* note 11, arts. 68, 69 ("Shidang danbao").

employ slightly different terms, the UCL is more in line with the CISG because both contain an enumeration of specific examples giving rise to the right to demand assurance.[100] However, the language in the three appears to be equally elastic.[101]

Article 68 of the UCL states that the "party required to perform first may suspend its performance if it has conclusive evidence establishing that the other party . . . is in any . . . circumstance which will or may cause it to lose ability to perform."[102] In the hypothetical, Rohm & Haas has delivered non-conforming pesticides. Perhaps this single delivery of non-conforming goods is not "conclusive evidence" that Rohm & Haas has "lost its ability to perform." But, if ChemImpex also had other information, such as that Rohm & Haas is incapable of producing conforming pesticide for some reason, the quantum of evidence may be sufficient to be deemed "conclusive evidence." As to future deliveries of the pesticide, ChemImpex would probably have a right to suspend its performance (payment) and demand assurances of conforming performance from Rohm & Haas. Rohm & Haas should be aware of this provision and be prepared to respond with appropriate assurances of performance.

The FECL did not specifically allow for suspension in the case of a "clear repudiation" (whereby a party expressly says that it will not perform). The UCL, however, does allow expressly for termination when faced with a clear repudiation.[103] The notion of "clear repudiation" as it relates to "anticipatory breach" will be discussed in section VI. Under the FECL, if Rohm & Haas were to come right out and say "we will not perform," ChemImpex would find no specific authority to suspend performance at that point. The UCL clearly states that ChemImpex would be justified in suspending based on such a statement.[104] However, even without this specific provision for "clear repudiation," it would seem that such a repudiating statement should have satisfied the "conclusive evidence" standard giving rise to suspension under both the FECL and the UCL.

The UCL goes beyond the FECL (which only dealt with suspension of performance) and actually provides specifically for termination of contractual obligations.[105] Continuing with the hypothetical, under the

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100. *See* CISG, *supra* note 20, art. 71.

101. *See generally* CISG, *supra* note 20; FECL, *supra* note 7; UCL, *supra* note 11. "Elastic language" is language subject to multiple interpretations. *See* FOLSOM ET AL., *supra* note 26, at 80-98 (discussing elasticity of language in the last-shot doctrine context).

102. UCL, *supra* note 11, art. 68.

103. *See* UCL, *supra* note 11, art. 94(ii); *see also* Rubenstein, *supra* note 5, at 520 (discussing the FECL's lack of a provision for "clear repudiation").

104. *See* UCL, *supra* note 11, art. 94(ii).

105. *See id.*

FECL, it would not have been clear whether ChemImpex could terminate its performance (the subsequent payments) or whether it could just continually suspend performance while awaiting assurances. This is because the FECL did not expressly provide for termination whereas it did provide for suspension of performance. The UCL now provides explicit authority to terminate if adequate assurances are not forthcoming. Therefore, if Rohm & Haas does not provide adequate assurances, it may be faced with termination of the contract.[106]

VI. BREACH AND DAMAGES

Article 19 of the FECL was more or less a codification of the common law rule of consequential damages first announced in *Hadley v. Baxendale*.[107] Article 113 of the UCL maintains this standard.[108] In the hypothetical, based on whether the damages to Chinese crops were foreseeable to Rohm & Haas, consequential damages could prove quite extensive.[109] But recall here that the UCL does not allow for Third Party Beneficiaries to sue on the contract,[110] therefore only ChemImpex would have an action against Rohm & Haas.[111]

The FECL did not seem to allow for punitive damages, and nothing in the UCL changes that position.[112] This was arguably not the position taken in the domestic ECL.[113] Like the FECL, the UCL allows for liquidated

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106. As stated earlier, this note focuses on the General Principles section of the UCL which deals specifically with the fundamentals applicable to contracts generally. Since here, the hypothetical deals specifically with a termination during a sales contract, specific articles of the UCL "Specific Provisions" dealing just with the particulars of sales contracts would also need to be addressed. *See* UCL, *supra* note 11, arts. 130-175; *see also supra* text accompanying note 31. Articles 165 and 166 deal specifically with termination during contracts calling for delivery in installments. *See* UCL, *supra* note 11, arts. 165-166.

107. 156 Eng. Rep. 145 (Ex. 1854). *See* FECL, *supra* note 7, art. 19 "The liability for damages by a party for breach of contract should be equal to the loss suffered by the other party as a consequence of the breach. However, such damages may not exceed the loss which the party in breach ought to have foreseen at the time of the conclusion of the contract as a possible consequence of the breach of contract.").

108. *See* UCL, *supra* note 11, art. 113.

109. "The rule of Hadley v. Baxendale is an attempt to restrict the promisor's liability for breach of promise to those consequences, the risk of which he knew about, or must be taken to have known about, when he made the contract." FARNSWORTH & Young, *supra* note 43, at 538. This is why it is significant in the hypothetical that Rohm & Haas was aware that the crops would be damaged if the pesticides were non-conforming.

110. *See Wang Liming, supra* note 17, at 361; *see also supra* text accompanying note 44.

111. The individual farmers in privity with ChemImpex would have a claim against ChemImpex and ChemImpex would no doubt include their claims as damages due from Rohm & Haas for breach of the contract.

112. *See* ZHENG, *supra* note 8, at 66.

113. *See* Wang Jun, *Symposium: Is the UCC Dead, or Alive and Well? International*

damages, but under both of these laws, the liquidated damages are to serve a strictly compensatory function.[114] Both Chinese laws make clear that if in actuality the liquidated damages do not generally reflect actual damages, a party may petition the courts or arbitral bodies to reform the liquidated damages to more closely conform with actual damages.[115] Limiting the parties' ability to contract for liquidated damages seems counter to the general trend in the UCL of increasing freedom of contract. Note however that the UCC also reflects that liquidated damages should reasonably reflect anticipated damages.[116]

Suppose that in the hypothetical, the contract had provided for a liquidated damages clause under which Rohm & Haas would have to pay ChemImpex two times the price of all non-conforming pesticide. Assume that this amount equaled $2.4 million, yet the actual damages to ChemImpex were only $1 million. Under the UCL, Rohm & Haas could petition the courts, or more likely the arbitral body, for a reduction of the liquidated damages to $1 million. Such a request should be granted under the UCL.[117]

Unlike the FECL, the UCL provides for anticipatory breach and should look familiar to a Common Law lawyer.[118] Article 108 states: "Where one party expressly states or indicates by its conduct that it will not perform its obligations under a contract, the other party may hold it liable for breach

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Perspectives: Punitive and Compensatory Contract Damages: A Comparative Study of UCC, Chinese, and International Law, 29 LOY. L.A. L. REV. 1071, 1082 (1996) (indicating that punitive damages are available in the domestic ECL, probably under the notion that since "the planned economic system still plays an important role in the country's national economy . . . [punitive damages are] the most effective way to prevent breach of economic contracts and ensure the completion of scheduled economic plans. . . ."). Consider also that since the UCL replaces the ECL in domestic-domestic contractual relations, the absence of punitive damages for contract in this new "domestic law" probably reflects China's continued shift away from a non-market economy.

114. *See* FECL, *supra* note 7, art. 20; UCL, *supra* note 11, art. 114.

> Where the amount of liquidated damages prescribed is below the loss resulting from the breach, a party may petition the People's Court or an arbitration institution to increase the amount; where the amount of liquidated damages prescribed exceeds the loss resulting from the breach, a party may petition the People's Court or an arbitration institution to decrease the amount as appropriate.

UCL, *supra* note 11, art. 114.

115. *See* FECL, *supra* note 7, art. 20; UCL, *supra* note 11, art. 114.

116. *See* U.C.C. § 2-718 (1978). Whereas the UCL explicitly states that if the liquidated damages do not accurately reflect actual damages, a readjustment will be forced, the UCC seems to be a little more permissive on the subject, requiring only that liquidated damages be set "at an amount which is *reasonable* in the light of the anticipated or actual harm." (emphasis added). *Id.*

117. *See* UCL, *supra* note 11, art. 114.

118. *See id.*

of contract before the time of performance."[119] The significance of this article to ChemImpex should be readily apparent. If ChemImpex could not claim anticipatory breach, then it would have to wait until the end of the period for performance (the full five years) before it could claim damages on the breach of the entire contract.[120] In addition, it would probably be required to sue separately as each individual performance became due. Article 108 makes clear that ChemImpex may sue for the entire breach once Rohm & Haas makes it clear through their conduct that they will not perform the contract.

VII. ASSIGNMENT AND DELEGATION

Under the FECL, agreement by all the parties to a contract seemed to be a prerequisite to assigning rights or duties under the contract.[121] Under the FECL, it was unclear whether the phrase "consent should be obtained" made consent obligatory or merely permissive.[122] The *"should"* here in the English translation was the same Chinese term that is translated as both "should" and "shall" in other places throughout the text.[123] In addition, Article 27 of the FECL provided that permission be obtained from competent government authority in order to assign certain types of contracts, particularly those contracts for which official approval was a prerequisite to formation.[124]

The UCL is more permissive in the area of assignment of rights. The UCL, rather than giving a negative mandate on assignment of rights, frames the rule as generally permissive: "The obligee may assign its rights under a contract... except where such assignment is prohibited."[125] Notably absent is any requirement to get consent to assign rights from the other party to the contract. The UCL, however, has not changed the previous position

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119. *See* UCL, *supra* note 11, art. 108.

120. Since this is a sales contract, Article 166 would be applicable. *See* UCL, *supra* note 11, art. 166; *see also supra* text accompanying notes 31, 101. Article 166 would allow for termination of the contract if this non-conforming delivery were to "frustrate the purpose" of the contract even without resort to anticipatory breach. *See* UCL, *supra* note 11, art. 166.

121. *See* FECL, *supra* note 7, art. 26. The English version translates as "consent *should* be obtained from the other party." Indeed the Chinese version also uses the term "yingdang" which probably best translates as "should." However, despite this permissive "should," the authorities have interpreted this as an imperative that permission *must* be obtained. "The Foreign Economic Contract Law provides that the assignment of contract rights and obligations is subject to agreement by all parties to a contract." ZHENG, *supra* note 8, at 66.

122. McLean & Zhang, *supra* note 2, at 139.

123. *See* CIDIAN, *supra* note 88, at 355 (explaining situation with "Yingdang").

124. *See* FECL, *supra* note 7, art. 27.

125. UCL, *supra* note 11, art. 79 (enumerating three things as prohibiting assignment: (1) the nature of the contract, (2) agreement between the parties, (3) applicable law).

requiring consent from the other side to assign duties under the contract.[126] In addition, the UCL seems to maintain the same position as the FECL as to contracts requiring official approval.[127] Among contracts requiring official government approval are contracts dealing with joint ventures.[128]

In the hypothetical, if Rohm & Haas wanted to transfer their rights in the contract to another party, and the FECL governed, they would probably (depending on the judicial determination of the word "should") have to obtain the consent of ChemImpex to do so. However, under the UCL, it is clear that Rohm & Haas could transfer their rights in the contract to another party, so long as such a transfer were not precluded by the contract itself or by law. Be mindful though that Rohm & Haas would still need the consent of ChemImpex to assign their obligations or duties under the contract. Under either contract law, if ChemImpex had been a joint venture entity, Rohm & Haas would need to get the permission of the appropriate Chinese authority in order to assign rights or duties.

VIII. DISPUTE SETTLEMENT

All of the various forms of Chinese contract law, and the GPCL put a great emphasis on arbitration rather than judicial settlement of disputes. The FECL, while allowing resort to the judicial system, was especially suggestive to the fact that arbitration is preferred and judicial proceedings should be an absolute last resort.[129] The new UCL retains this preference for arbitration, and like the FECL, allows resort to the courts if all else fails.[130] In fact, both the FECL and the UCL require that parties arbitrate if

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126. *See* UCL, *supra* note 11, art. 84.

127. *See* UCL, *supra* note 11, art. 87. This article merely states the obvious that if this particular kind of contract by law or regulation requires official permission prior to reassignment, then the law or regulation must be followed. It is in much more generic terms than article 27 of the FECL. *See id.*; FECL, *supra* note 7, art. 27.

128. *See* McLean & Zhang, *supra* note 2, at 139.

129. *See* FECL, *supra* note 7, arts. 37, 38. Article 37 reads as follows:

> Any disputes arising from a contract *ought* to be settled by the parties, if possible, through consultations or mediation of a third party. *In case* the parties are *unwilling* to solve a dispute through consultation or mediation, or *fail to do so*, the dispute may, in accordance with the arbitration clause provided in the contract or the written arbitration agreement reached by the parties afterwards, be submitted to a Chinese arbitration body or other arbitration body.

FECL, *supra* note 7, art. 37 (emphasis added). Article 38 reads "[i]n case neither an arbitration clause is provided in the contract nor a written arbitration agreement is reached afterwards, the parties may bring suit in the People's Court." FECL, *supra* note 7, art. 38 (emphasis added).

130. *See* UCL, *supra* note 11, art. 128. Although when discussing last resort to the courts, both the FECL and the UCL refer only to the "People's Courts" (the courts of the PRC), there is some evidence that since both the FECL and the UCL state that parties may bring suit in the

an arbitration clause exists in the contract.[131]

The literal language of the UCL seems to direct that if the parties had an arbitration clause in the contract, whether or not both parties subsequently agreed at the time of conflict to go before the courts rather than arbitrate, the UCL would still require the parties to arbitrate. Despite this literal language, the author has been assured by friends in the Chinese legal community, that this in not the case. Rather, if both parties agree, they may opt out of the arbitration clause at the time conflict actually arises.

IX. EXCUSE OF PERFORMANCE

Article 29 of the FECL listed the major provisions which give rise to cancellation of contract as: (1) serious breach, (2) failure to perform within a grace period, (3) force majeure, and (4) the occurrence of agreed upon conditions.[132]

According to one author, the FECL's failure to define "serious breach"[133] could possibly render many more contracts avoidable under the FECL than under the CISG with its internationally-recognized terms like "fundamental [breach]" and "foreseeability."[134] Under the UCL, this situation appears to have improved. The UCL does not use the undefined term "serious breach," but rather provides that a breach which leads to "frustration of purpose" is a grounds for termination.[135] While the notion of frustration of purpose is by no means a concept with a single concrete meaning, it is at least a familiar term in international contract parlance.[136]

Based on the delivery of pesticides completely worthless for their stated purpose in the contract, ChemImpex could probably claim that the purpose

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People's Courts, then the use of "may" indicates that the parties *may* also apply to foreign courts. *See id.*; FECL, *supra* note 7, art. 38; ZHENG, *supra* note 8, at 67.

131. *See* UCL, *supra* note 11, art. 128; FECL, *supra* note 7, art. 37; *see also* Victor Perez, Note: *From Open Markets to Closed Courts: The Resolution of Joint Venture Contract Disputes Through Arbitration in China*, 12 FLA. J. INT'L L. 491 (1998-2000) (giving a broad overview of the state of arbitration in China).

132. *See* Shen, *supra* note 26, at 38; FECL, *supra* note 7, art. 29.

133. The term "serious breach" refers to the phrase "[t]he expected economic interests are infringed *seriously* for the *breach* of the contract by the other party." "Lingyifang *weifan* [breach] hetong, yizhi *yanzhong* [seriously] yingxiang dingli hetong suo qiwang de jingji liyi." FECL, *supra* note 7, art. 29 (emphasis added).

134. *See* Shen, *supra* note 26, at 40; FECL, *supra* note 7, art. 29; CISG, *supra* note 20, art. 25.

135. *See* UCL, *supra* note 11, art. 94(iv). The Chinese language from which the translators derived "frustrates the purpose" is literally translated as "cannot achieve the objective [bu neng shixian mudi]." Under this language, one must speculate whether a Chinese court would or even should constrain itself to the Common Law or developing international doctrines of frustration of purpose.

136. *See generally* FOLSOM ET AL., *supra* note 26 (discussing frustration of purpose in the international context with case illustrations).

of the contract had been frustrated. As such, ChemImpex's further performance would be excused under the UCL's "frustration of purpose" language.

ChemImpex would certainly like to know if it will be given a grace period under which to deliver conforming pesticide. The UCL retains in very similar language the FECL's provision regarding failure to perform within a grace period.[137] At first glance, the UCL seems to carry over from the FECL the ambiguity of whether it is mandatory or permissive (as in the CISG)[138] to give the breaching party a grace period, only after the expiration of which, the right to terminate arises.[139] However, the UCL adds an additional provision which seems to make it reasonably clear that the granting of an additional grace period is optional.[140] In making the grace period optional, the drafters further bolstered freedom of contract. Under the UCL, if a party desires a grace period in case of a breach, that party will have to contract for it at the outset.

Therefore, it appears that under the FECL, it is more likely that ChemImpex would have to give Rohm & Haas a grace period during which to perform. However now under the UCL, it is at ChemImpex' discretion whether to give such a grace period. Rohm & Haas' lawyers should have been aware of this provision and contracted at the outset for a grace period in the event of such problems.

Recall that under the FECL, while there was clear provision for suspension of the contract if faced with nonperformance, there was no explicit provision for termination. One Chinese author pointed out that a key similarity between the relevant provisions of the FECL and the CISG was that "the party seeking to avoid the contract does not have to prove the seriousness and effects of the breach."[141]

The UCL clarifies this situation by only allowing a party to suspend performance if the other party breaches its "main obligations" as compared to "any breach" in Article 49 of the CISG.[142] Just based on the plain text,

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137. *See* UCL, *supra* note 11, art. 94(iii); FECL *supra* note 7, art. 29(2).

138. *See* CISG, *supra* note 20, arts. 47(1), 63(1).

139. *See* Shen, *supra* note 26, at 40-41 (explaining that article 29 of the FECL has been interpreted in both ways). The language in Article 94(iii) of the UCL is nearly identical to that of the FECL, except it uses the term "main obligations." Article 94 states: "[t]he other party delayed performance of its main obligations, and failed to perform within a reasonable time after receiving demand for performance" UCL, *supra* note 11, art. 94(iii).

140. *See* UCL, *supra* note 11, art. 94(iv) ("[t]he parties may terminate a contract if . . . the other party delayed performance or otherwise breached the contract, thereby frustrating the purpose of the contract"). Since this provision does not specify what degree of breach is required, it would seem that this provision could override the "main obligation" language in the "delayed performance" provision discussed later.

141. Shen, *supra* note 26, at 40.

142. *See* CISG, *supra* note 20, art. 49(2)(b); UCL, *supra* note 11, art. 94(iii).

a breach of a "main obligation" seems more serious than a mere "breach," and therefore may not allow a party to suspend performance under as many circumstances. Perhaps raising the level of proof required to suspend performance of contracts under the UCL is congruent with the fact that the UCL now specifically provides for termination of the contract. Since under the FECL, it was not clear when suspension could become termination, it is possible that the lower level of proof helped to ease the transition to termination.

It appears that generally, Chinese doctrine interprets force majeure narrowly.[143] Both the FECL and the UCL define Force Majeure as "any objective circumstance which is unforeseeable, unavoidable and insurmountable."[144] The FECL provided a stipulation that parties could themselves define an event of force majeure, although this seemed odd in light of the requirement that an event of force majeure be unforeseeable.[145] It is difficult to see what such a stipulation would add to the contract that a simple condition subsequent discharging contractual obligations would not.[146] Presumably, this may be the reason that the UCL no longer allows parties to stipulate force majeure events.[147] While the force majeure provision of the FECL accounted for the common law concept of impossibility of performance, it did not seem to entail frustration of purpose.[148] The UCL provision now entails frustration of purpose.[149]

Retaining the force majeure provision of the FECL in the UCL leaves open several questions, such as what kind of event qualifies as unforeseeable, unavoidable, and unsurmountable. It is unclear whether the

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143. *See* Lester Ross, *Force Majeure and Related Doctrines of Excuse in Contract Law of the People's Republic of China*, 5 J. CHINESE L. 58, 60 (1991).

144. *See* UCL, *supra* note 11, art. 117.

145. *See* FECL, *supra* note 7, art. 24; Ross, *supra* note 143, at 80 ("This may enable a party to invoke force majeure even for an event that is not stipulated in the force majeure clause . . . on the grounds that the actual event is analogous to [a stipulated event]; . . . that the parties would have stipulated the event but were incapable of doing so because of its inherent unforeseeability.").

146. In fact, Article 93 of the UCL provides: "The parties may prescribe a condition under which one party is entitled to terminate the contract. Upon satisfaction of the condition for termination of the contract, the party with the termination right may terminate the contract." UCL, *supra* note 11, art. 93. Presumably, one party could write into the contract a condition that the party may terminate the contract in the event of certain labor problems, or some other event which might not necessarily fall within the more narrow category of force majeure.

147. *See generally* UCL, *supra* note 11 (lacking any specific provision allowing parties to stipulate which events will constitute force majeure events).

148. *See* UCL, *supra* note 11, art. 117.

149. *See* Ross, *supra* note 143, at 81. Although Ross focused on the FECL, the similarity of the FECL force majeure provision with that of the UCL allows his analysis in this respect to apply to the UCL as well. The UCL specifically states that "[t]he parties may terminate a contract if ... force majeure frustrated the purpose of the contract." UCL, *supra* note 11, art. 94(i).

PRC government's interference with the Contract under the auspices of the "Five Year Plan" would count as a force majeure.[150] At least one author has noted that in the days when Chinese contract law specifically allowed for changes in the contract due to changes in the state plan, courts frequently invoked the state plan in making such changes.[151] Now that the UCL no longer makes specific reference to the state plan, it is unclear whether force majeure doctrine will allow parties to change the contract based on changes in the state plan.[152] At any rate, "[j]udicial discretion generated by ambiguity in the doctrine of force majeure may allow the state to pick and choose when performance is required."[153]

In the hypothetical, if a new Five Year Plan emerged in which agriculture (and therefore pesticides) no longer commanded great importance in the Central Plan, would the Chinese government's reallocation of shipping assets constitute force majeure? Recall that in the hypothetical, the shipping company is a state-owned entity. When Rohm & Haas goes to deliver the pesticides at the port to Shipper, and Shipper is nowhere to be found, ChemImpex might claim that it is excused from further performance based on the force majeure of the change in the Five Year Plan. If the change in the Five Year Plan which lead to the reallocation of shipping assets is deemed force majeure, ChemImpex will be excused. This is the type of contingency which Rohm & Haas should specifically anticipate in the contract.

The UCL also carries over the concept of simultaneous breach from the FECL, a concept wholly-foreign to U. S. Law.[154] Article 121 of the FECL states that "[i]n a case where both parties are in breach of the contract, each shall bear corresponding liabilities respectively."[155] The UCL's equivalent passage reads, "In case of bilateral breach, the parties shall assume their respective liabilities."[156] Despite this apparent difference in wording, the Chinese version of the two articles is exactly the same, and therefore it is safe to assume that the NPC did not intend to change the pre-UCL concept of simultaneous breach. United States contract law recognizes an order of performance and therefore precludes the notion of simultaneous breach.[157] Lawyers for Rohm & Haas would need to be aware of this concept and be

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150. *See* Ross, *supra* note 143, at 83.

151. *See* Rubenstein, *supra* note 5, at 522.

152. *See id.*

153. *Id.*

154. *See* FECL, *supra* note 7, art. 21; UCL, *supra* note 11, art. 120; McLean & Zhang, *supra* note 2, at 137.

155. FECL, *supra* note 7, art. 21.

156. UCL, *supra* note 11, art. 120.

157. *See* McLean & Zhang, *supra* note 2, at 137. If an order of performance is recognized, then one party's performance naturally comes before the other's; therefore, only one party may breach at a time, and simultaneous breach is precluded.

on the lookout for something in ChemImpex' performance which could be deemed a simultaneous breach.[158]

X. CONCLUSION

The UCL is but one of a number of steps in the PRC's drive towards developing a modern legal system in tune with its developing market economy. It is necessary to remember that while the UCL contains many terms and phrases which ring familiar in an international lawyer's ear, this law is grounded in the PRC's nascent jurisprudence. Only by considering the meaning of these terms and phrases within the PRC's brief legal history can any practical meaning be discerned. This Note has explored the future application of the UCL by considering previous analysis and Chinese application of the UCL's predecessors. Extrapolating from sources analyzing the application of the UCL's predecessors, this Note has shown how the UCL should increase freedom of contract in China. Further, this Note has shown how in many respects, the outcome of one particular hypothetical would be very different under the UCL than under the previous FECL. Future application of the UCL will judge this note's extrapolation from the past.

158. McLean & Zhang explain:

> [T]his concept of mutual or simultaneous breach is consistent with the Chinese view of dispute settlement. Characterized by the phrase dividing one into two, the Chinese view a dispute from each party's perspective. Thus, a foreign litigant and its counsel should be prepared to argue such concepts before a Chinese tribunal if disputes arise in transactions with Chinese enterprises.

Id. (citations omitted).